

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

**UNITE HERE! LOCAL 5
Respondent**

and

**Cases 20-CB-163657
20-CB-166055**

**AQUA-ASTON HOSPITALITY, LLC
d/b/a WAIKIKI BEACH HOTEL AND
HOTEL RENEW
Charging Party.**

*Jeff Beerman, Esq.,
for the General Counsel.*

*David Barber, Esq. (Davis, Cowell & Bowe)
for the Respondent.*

*Robert Katz and Jennifer Gitter, Esqs. (Torkildson, Katz, et al.),
for the Charging Party.*

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, Administrative Law Judge. On November 6, 2015, Aqua-Aston Hospitality, LLC, d/b/a Waikiki Beach Hotel and Hotel Renew (Charging Party, Aqua-Aston or the Hotel) filed an unfair labor practice (ULP) charge against UNITE HERE! Local 5 (Respondent), alleging violations of the National Labor Relations Act (NLRA or the Act).¹ The Hotel amended its ULP charge on December 14, 2015. On December 15, 2016, the Hotel filed a second ULP charge against Respondent.² The Regional Director for Region 20 (Regional Director) issued a complaint and notice of hearing on January 29, 2016, then, on March 30, 2016, consolidated both charges and issued a consolidated complaint and notice of hearing.

The consolidated complaint alleges that Respondent violated Section 8(b)(1)(A) of the Act when, on multiple occasions in 2015, it established a picket line and unlawfully blocked the ingress/egress to the entrance/exit of the Hotel. Respondent filed its answer and amended answer denying all material allegations and setting forth its affirmative defenses to the complaint.

This case was tried before me in Honolulu, Hawaii, on April 19 and 20, 2016. All parties were afforded a full opportunity to appear, introduce evidence, examine and cross-examine

¹ Case 20-CB-163657.

² Case 20-CB-166055.

witnesses, argue orally on the record, and file briefs. After carefully considering the entire record, including the demeanor of the witnesses and the parties' post-hearing briefs, I find that Respondent violated the Act as alleged in the complaint.³

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Aqua-Aston Hospitality, a limited liability company, has been engaged in the business of operating hotels that provide food and lodging. It has a place of business in Honolulu, Hawaii, where it operates and manages the Aston Waikiki Beach Hotel and the Hotel Renew.

Although not specifically admitted in this case, in a separate case, the parties previously admitted that, in conducting its business operations, Aqua-Aston derived gross revenues in excess of \$500,000 and purchased and received at its Honolulu hotel goods valued in excess of \$5,000 directly from points outside the State of Hawaii. Accordingly, I find that Aqua-Aston has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁴

It is also undisputed, and I find that, at all material times, Respondent, UNITE HERE! Local 5, has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Charging Party's operations

The Aston Waikiki Beach Hotel and the Hotel Renew are two adjacent hotels located in Waikiki. The Aston Waikiki is located on the corner of Kalakaua Avenue and Paoakalani Avenue. Kalakaua Avenue is a one-way street that runs parallel to the ocean. Paoakalani Avenue is also a one-way street that runs perpendicular to Kalakaua Avenue. The entrance to the Aston Waikiki faces Paoakalani Avenue.

The Hotel Renew is located next to the Aston Waikiki on Paoakalani Avenue at the intersection of Lemon Road. Lemon Road is also a one-way street that runs parallel to Kalakaua Avenue.

³ Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "U. Exh." for Respondent's Exhibits, "GC Br." for the General Counsel's brief, "U. Br." for Respondent's brief, and "CP Br." for the Charging Party's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive.

⁴ See *Aqua-Aston Hospitality, LLC, et al.*, JD(SF)-24-16 2016 WL 3072194 (May 31, 2016). I take administrative notice of the jurisdictional findings of Administrative Law Judge (ALJ) Mara-Louise Anzalone.

In order to enter and exit the Aston Waikiki, guests, taxis, and other vehicles must access the property through the hotel's *porte cochere* (driveway). The *porte cochere* is a single-direction, u-shaped driveway with a designated entrance and exit along Paoakalani Avenue.⁵ There is a pedestrian walkway leading from Paoakalani Avenue's sidewalk into the Aston Waikiki that bisects the *porte cochere*.⁶

The *porte cochere* is the only location where guests can drop off their vehicles at the Hotel.⁷ Guests cannot self-park their cars. As such, all of the Hotel's guests must leave and retrieve their parked cars using the valet service located in the *porte cochere*. Similarly, taxis, recently retrieved (but not picked up) valeted-vehicles, and vehicles of persons patronizing the Hotel's restaurant must utilize the *porte cochere* for short-term parking. These cars are parked inside the *porte cochere* near the driveway exit.⁸ All vehicles entering or exiting the Hotel through the *porte cochere* entrance or exit must cross over the public sidewalk along Paoakalani Avenue.⁹

The Aston Waikiki has a single parking garage located on Lemon Road next to the Hotel Renew. Valet employees are the only individuals authorized to park guest vehicles in the parking garage.¹⁰

In order to park a guest's vehicle, valet drivers must exit the *porte cochere*, drive out of the driveway exit, cross over the Paoakalani public sidewalk to get to Paoakalani Avenue, then park the vehicle in the Hotel's parking garage on Lemon Road.¹¹ Similarly, to retrieve a guest's vehicle, valet drivers must drive around to Kalakaua Avenue, turn right onto Paoakalani Avenue, cross the Paoakalani public sidewalk then drive through the driveway entrance into the Hotel's *porte cochere*.¹² There are approximately 16 valet/bell employees, including a bell clerk and a public area attendant who work at or near the *porte cochere*.¹³ Randy Tolentino (Tolentino) served as one of the Hotel's Bell Captains/valet employees. It is undisputed that he parked guest's vehicles as part of his job duties during the matters at issue in this complaint.

The Charging Party contracts with the Universal Protection Services (UPS) to provide security for the Aston Waikiki and the Hotel Renew. Andrew Smith (Smith) is a UPS employee and serves as the post commander for the Aston Waikiki and Hotel Renew.

⁵ GC Exh. 2; see also GC Exhs. 3–4.

⁶ GC Exhs. 2–4.

⁷ Tr. 41, see also GC Exh. 2.

⁸ U. Exh. 1.

⁹ GC Exhs. 3–4 (photographs of the entrance into the *porte cochere* and exit out of the *porte cochere*. The sidewalk in front of the Hotel is parallel to Paoakalani Avenue).

¹⁰ Tr. 40. Hotel employees have a separate parking lot—also on Lemon Road—where they park their vehicles during their shifts. Employees park their own vehicles when they arrive for work and do not use the Hotel's valet to park their cars. Tr. 108, 110–111.

¹¹ GC Exhs. 2, 4.

¹² GC Exhs. 2, 3.

¹³ Tr. 403, 418–419.

2. The Union's organizing campaign

It is undisputed that, beginning February 2015 until mid-March 2016, Respondent began an organizing campaign at the Hotel, which involved numerous Union-sponsored rallies and/or pickets in front of, near and around the Hotel.¹⁴ On average, Respondent maintained at least one picket line at least once a week or once every other week since February 2015.

The number of Union picketers ranged from approximately 15–37 picketers (small picket) to between 75–200 picketers (larger picket).¹⁵ The larger pickets occurred once or twice a month and were held in the afternoons. Respondent held the smaller-sized pickets in the mornings between approximately 6:30 and 7:30 a.m. During the smaller rallies, Respondent usually maintained picketers in front of the *porte cochere* exit, but on a few occasions, Respondent positioned picketers in front of the *porte cochere* entrance. During the larger rallies, Respondent positioned picketers in two picket lines: one in front of the *porte cochere* exit and one in front of the *porte cochere* entrance.

Whether Respondent picketed in front of the Hotel's driveway entrance or exit or during a morning or afternoon rally, it is undisputed that the participants marched in an oblong circle on the sidewalk, although sometimes the width of the picketers' circle did not accommodate pedestrian traffic. During each of protests at issue, the picketers carried signs that read, "Aston/Renew No Respect, No Union Contract with Unite HERE! Local 5," chanted slogans using bullhorns, banged cans with drumsticks and used other noise makers while they marched in front of the Hotel. It is also undisputed that, while the picketers marched, all vehicles that approached the Hotel, whether they were driven by valets, guests, taxis or the general public, were made to wait and were unable to enter and/or exit the *porte cochere*.¹⁶

Picket line captains were responsible for directing each picket line, monitoring and breaking the line, and stopping vehicular traffic while the picketers marched in front of the Hotel. During all of the protests at issue, Daniel Kerwin (Kerwin), Respondent's director of internal organizing, was the picket line captain covering the driveway entrance. Union organizer Victor Gonzales (Gonzales) served as the picket line captain covering the driveway exit.¹⁷ In directing vehicular traffic during the protests, it is undisputed that, when a car approached the picket line, Kerwin or Gonzales placed themselves between the car and picket line then extended their hand toward the approaching vehicle to signal the vehicle to stop. Thereafter, Kerwin/Gonzales motioned the picketers to continue marching, and, after approximately one to four minutes, they signaled the picketers to "break [or disperse]." After hearing the "break" call, the picketers moved from the driveway exit or entrance—depending on where they were picketing—to allow the vehicle to enter/exit the Hotel. It was within Kerwin's or Gonzales' discretion as to how long he blocked a car from entering/exiting the Hotel.¹⁸ Regardless, the

¹⁴ GC Exh. 5.

¹⁵ GC Exhs. 5, 6.

¹⁶ Tr. 53, 79, 83, 87, 90, 202–203; see also GC Exh. 7, U. Exh. 1.

¹⁷ U. Exh. 1, File 20150818154254 at 6:55, 15:00; see also Tr. 233–234.

¹⁸ Tr. 229, 300, 302, 338–339.

Union's purpose for stopping all vehicles was to "annoy" drivers and bring attention to Respondent's message.¹⁹ It is against this backdrop that the following incidents occurred.

B. Specific Incidents of Alleged Unlawful Conduct

The issue in this case is whether Respondent Union, during its protests, unlawfully blocked the ingress/egress to the entrance/exit of the Hotel on six separate occasions: August 18, October 3, 14, 24, and 30, and December 7, 2015. After carefully reviewing the record, I find the following facts.²⁰

1. The August 18, 2015 picket

It is undisputed that Respondent videotaped all of its pickets. Except for the rally on October 24, 2015, Respondent's videographers did not continuously record the entire picket; rather, they only recorded various segments of the picket.²¹

On Tuesday, August 18, 2015, at approximately 3:30 p.m., Respondent staged an afternoon protest in front of the Hotel. Approximately 170 union members participated. Picketers marched in circular formations in front of the Hotel driveway entrance and exit.²² Kerwin was the picket line captain covering the driveway entrance, and Gonzales served as the picket line captain covering the driveway exit. Two other groups of protesters marched on both sides of Kalakaua Avenue. The majority of the picketers carried signs, chanted, through bullhorns, and used various noise makers during the protest. The Honolulu Police Department (Police or HPD) was called to the Hotel to assist with crowd control and the noise. The protest ended around 4:40 p.m. Respondent videotaped portions of the protest, but the video focused primarily on the picket line in front of the *porte cochere* driveway entrance.²³

¹⁹ Tr. 203, 298, 324, 328–329, 336, 427.

²⁰ In making my credibility findings, all relevant factors have been considered, including the interests and demeanor of the witness; the impact of bias on the witness' testimony, the quality of the witness' recollection; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert. denied* 522 U.S. 948 (1997). Credibility findings need not be all-or-nothing propositions, and it is common for the fact finder to credit some, but not all, of a witness' testimony. *Daikichi Corp.*, *supra*.

²¹ The parties stipulated that all of the videos were taken by individuals who work for the Union. A single camera owned by the Union recorded all of the videos. The Union established a rotating system for recording the pickets. Specifically, different teams of organizers were assigned to film different actions on particular weeks. Thereafter, the camera was given to the next team whose turn it was to film the next union activity. At the end of the day, the camera was returned to the Union office and video was uploaded onto a server. The Union never edited the videos.

²² GC Exh. 5 at 111; see also GC Exh. 6.

²³ U. Exhs. 1–2. The video of the August 18 picket consisted of six separate recordings that were approximately 57 minutes long in total. The video focused on the Union's picketing activity in front of the *porte cochere* driveway entrance. No records were submitted on the Union's picketing in front of the *porte cochere* driveway exit.

Post Commander/Security Supervisor Smith observed some of the picketing on August 18. He testified that approximately 15 to 20 vehicles attempted to either enter or exit the Hotel but were stopped and forced to wait between 30 seconds and four minutes while the Union picketed. Smith timed each vehicles' wait times on his watch. He also observed traffic backed up on Paoakalani Avenue multiple times due to the picketing in front of the driveway entrance. According to Smith, Kerwin made each vehicle wait approximately three to four minutes before allowing access to the Hotel entrance.²⁴ For his part, although Kerwin testified that he stopped cars at the driveway entrance for, at most, 30 seconds during the August 18 protest, he admitted that he did not independently time how long he made each car wait before directing the picket line to move aside.

Overall, I credited Smith's testimony over that of Kerwin. I found Kerwin's testimony less than fully credible, mainly because he gave inconsistent statements and was often evasive when asked about the back up of cars entering the Hotel while he was captain covering the driveway entrance. Specifically, Kerwin initially testified that he could not recall whether any cars were backed up on Paoakalani Avenue during the August 18 protest. Subsequently, Kerwin admitted that he was not paying attention to any backup because he was focused on monitoring the line. Yet, upon further questioning, he recalled seeing "three or four" cars backed up on Paoakalani Avenue waiting to turn into the driveway entrance. However, the video at Union Exhibit 1 clearly shows at least one instance where the Union's picketing caused a backup of traffic on Paoakalani Avenue all the way to Kalakaua Avenue.²⁵

Moreover, Kerwin was equivocal regarding the wait times for the vehicles he stopped. Although Kerwin testified that, in general, he allowed the picketers to march in an oblong circle "twice" before breaking the line, he had no independent confirmation of how long that process lasted. While Respondent's counsel argues that the August 18 video recording is the best evidence of the approximate wait times of each vehicle, the video is not entirely reliable because it only captured random portions of the protest. In sum, Kerwin's changing testimony on this issue made him appear as if he was less than forthcoming which made his testimony unreliable. Accordingly, I find that, during the August 18 protest, the union picketed in front of the Hotel's entrance, and in so doing, Kerwin made multiple vehicles stop and wait approximately three to four minutes each before they could enter the Hotel. The Union's activity caused a backup of cars from the Hotel's entrance onto Paoakalani Avenue.

2. The October 3, 2015 picket

It is undisputed that Respondent maintained a single, small picket on the morning of October 3 in front of the *porte cochere* driveway exit. The picket lasted from approximately 6:37 to 7:25 a.m. Approximately 17 individuals participated in the picket. Gonzales was the picket line captain that day.²⁶ Smith was working that day and observed the picketing. Again, the picketers carried signs, chanted, through bullhorns, and used other noise makers. The HPD was called to the Hotel to assist with crowd control and the noise. It is undisputed that Respondent

²⁴ Tr. 79–81, 234, 309–312; see also U. Exh. 1.

²⁵ U. Exh. 1, File 20150818154254 at 34:00–35:00.

²⁶ Tr. 261; see also GC Exhs. 5–6; U. Exh. 1.

recorded approximately 26:48 minutes of video over five separate recordings of the October 3 picket.²⁷

Smith testified that he observed Gonzales stop approximately six or seven vehicles as they attempted to leave the Hotel's *porte cochere*.²⁸ According to Smith, as the Union had done previously, when a vehicle approached the driveway exit, Gonzales held up his hand toward the vehicle to signal the vehicle to stop. Afterwards, Gonzales turned around and motioned the protestors to continue picketing. In fact, on one occasion, a male picketer was overheard saying, "go on, go on, keep going," while a guest's vehicle was blocked from leaving.²⁹ On another occasion, picketers were overhead saying, "wait for a while, a little while longer," as a guest attempted to exit the driveway. That guest was blocked for approximately two minutes before being allowed to leave the Hotel.³⁰ According to Smith, Gonzales and/or the picketers blocked the egress of these six or seven vehicles for between two and four minutes that day.³¹

Although Gonzales testified that, in general, he typically held cars at the driveway exit between 30 seconds and two minutes, or until the picketers marched twice in a circular formation before breaking the line, I credit Smith's testimony for several reasons. First, Smith observed, timed each vehicle's wait time on his watch and noted those times in his incident report.³² His notes were specific and detailed regarding the wait times as well as the picketers' statements, if any, as they blocked each vehicle's egress.

Although Smith testified that, during the October 3 protest, wait times ranged from two to three minutes and his incident report noted wait times between two and four minutes, his Board affidavit (also known as his *Jencks* statement) claimed that some wait times were as long as five minutes. However, I do not find these varying wait times internally inconsistent but were Smith's attempt to give a range of the wait times of the vehicles he observed on October 3. Rather, I find Smith's recollection and testimony of the wait times generally consistent from between two and four minutes. While I note that Smith contradicted himself about how he recorded vehicle wait times (i.e., Smith initially testified that he did not write down any wait times less than two minutes long, then stated he recorded wait times of less than two minutes, however, other than his observations during the October 14 protest, no wait times of less than two minutes were noted in GC Exh. 5), this discrepancy does not detract from Smith's overall testimony that vehicles he observed were blocked from between two and four minutes during the October 3 protest.

²⁷ U. Exh. 1 File AM Rally 630 and File AM Rally 7.

²⁸ Tr. 84; see also GC Exhs 5 at 93-94; U. Exh. 1 File AM Rally 630 and File AM Rally 7. U. Exh. 1 does not extend in time over the entire October 3 protest. Rather, the video shows the wait times experienced by only two vehicles (both approximately one minute). See U. Exh. 1, File AM Rally 630 at 12:16 - 13:23 and File AM Rally 7 at 0:37-1:37; see also Tr. 353, 438. However, Smith recorded every car that he observed trying to exit the Hotel but was blocked by the Union's picket. See GC Exh. 5 at 93-94.

²⁹ GC Exh. 5 at 94.

³⁰ Id.

³¹ Tr. 84, 279-280; see also GC Exh. 5 at 93-94.

³² See GC Exh. 5 at 93-94.

Finally, while Respondent argues that the October 3 video shows the average wait time of vehicles blocked was between 58 seconds and 1.10 minutes, again, the video failed to capture every vehicle that was blocked during the morning protest.³³ As such, the video is not entirely representative of *all* vehicle's wait times since some vehicles could have been stopped for no more than one minute, while others were blocked for two to four minutes as Smith recorded. Accordingly, I found Smith's testimony credible and that, on October 3, at least six to seven vehicles were blocked by Respondent's picketers for between two to four minutes before being allowed to leave the Hotel.

3. The October 14, 2015 picket

It is undisputed that Respondent held a single, small picket on the morning of October 14 in front of the *porte cochere* driveway exit. The picket lasted from 6:35 to 7:35 a.m.³⁴ Approximately 21 individuals participated in the picket. Gonzales served as the picket line captain that day.³⁵ Smith was also working and he and Security Officer Roberto Vargus observed the picket that day. The picketers again carried signs, chanted, using bullhorns, and used other noise makers during the protest. The HPD was called to the Hotel three times for assistance with crowd control and the noise. It is undisputed that Respondent recorded portions of the October 14 picket.³⁶

Smith testified that he saw at least two vehicles that were stopped while attempting to cross Respondent's picket line. According to Smith, one vehicle drove up to the picket line and tried to exit the Hotel but was stopped by Gonzales and the picketers. That vehicle was stopped at the driveway exit for less than one minute before reversing and exiting through the *porte cochere* entrance.³⁷ Another vehicle was stopped by Gonzales for approximately 1½ minutes before being allowed to cross Respondent's picket line and exit the *porte cochere*.³⁸ For his part, Gonzales admitted that he typically stopped vehicles for approximately 1½ minutes before allowing them to exit the Hotel.³⁹

4. The October 24, 2015 picket

It is undisputed that Respondent held a single, small picket on the morning of October 24 in front of the *porte cochere* driveway exit. The picket lasted from approximately 6:35 to 7:28

³³ R. Br. at 10.

³⁴ Tr. 87; GC Exhs. 5-6, see also U. Exh. 1.

³⁵ Tr. 265; see also U. Exh. 1.

³⁶ U. Exh. 1 File 20151014064201, File 20151014064259, File 20151014070331, File 20151014070647, File 20151014071005, and File 20151014071803.

³⁷ Id.; see also Tr. 87; GC Exh. 5 at 83. U. Exh. 1 did not record the entire October 14 protest. Rather, the video shows the wait time of one taxi driver (approximately 1:15 minutes). However, Smith recorded every car that he observed trying to exit the Hotel but was blocked by the Union's picket. See GC Exh. 5 at 83.

³⁸ GC Exh. 5 at 83; see also GC Exh. 6; U. Exh. 1 File 20151014064201, File 20151014064259, File 20151014070331, File 20151014070647, File 20151014071005 and File 20151014071803.

³⁹ Tr. 279-280.

a.m.⁴⁰ Approximately 23 individuals participated in the picket. Gonzales was the picket line captain that day.⁴¹ As with the other protests, it is undisputed that picketers carried signs that read, “Aston/Renew No Respect; No Union Contract with Unite Here Local 5.” Picketers also chanted through bullhorns and used various noise makers during the protest. The HPD was called to the Hotel for assistance with crowd control and to “protect . . . the working Hotel employees.”⁴² It is undisputed that Respondent recorded a portion of the October 24 picket.⁴³

Hotel security officers on duty observed at least three to four vehicles attempting to exit the Hotel. Each car was stopped by Gonzales and prevented from exiting for approximately three minutes.⁴⁴

Again, while Gonzales testified that, when he served as picket captain on the driveway exit, he generally stopped vehicles for at least 1½ minutes, or to allow picketers to march in a circular formation twice before breaking the line, his testimony is not entirely reliable. Specifically, I note that Gonzales had no objective, independent measure of the wait times of each vehicle. Moreover, while the video of the October 24 protest generally shows wait times ranging from approximately 51 seconds to two minutes, as stated above, the video only captured a portion of the protest and is not representative of the wait times of all the vehicles that attempted to exit the Hotel that day. However, I rely on the incident report made contemporaneous with the October 3 protest in finding that security guards on duty observed and timed that at least three vehicles were blocked from exiting the Hotel for approximately three minutes.⁴⁵

5. The October 30, 2015 picket

It is undisputed that Respondent maintained a single, small picket on the morning of October 30 in front of the *porte cochere* driveway exit. The picket lasted from 6:33 to 7:20 a.m.⁴⁶ Approximately 17 individuals participated in the picket. Gonzales served as the picket line captain that day. Smith and Valet driver Tolentino were also on duty and observed the picket on October 30. As with the other protests, the HPD was called to the Hotel for assistance with crowd control, noise and to secure “the safety of working Hotel employees.”⁴⁷

Smith testified that he observed union picketers block the egress of seven or eight vehicles.⁴⁸ According to Smith, Gonzales/picketers detained most vehicles for approximately

⁴⁰ GC Exh. 5–6; U. Exh. 1.

⁴¹ Tr. 267; see also U. Exh. 1.

⁴² GC Exh. 5 at 78.

⁴³ U. Exh. 1 File 10-24-2015.

⁴⁴ *Id.* The video did not record the wait times of any of the vehicles before they exited the Hotel that day.

However, Smith compiled the reports from the security officers on duty that day who observed cars trying to exit the Hotel but were blocked by the Union’s picket. See GC Exh. 5 at 78–79.

⁴⁵ GC Exh. 5 at 78–79.

⁴⁶ Tr. 90; see also GC Exh. 5–6.

⁴⁷ GC Exh. 5 at 72.

⁴⁸ Tr. 90, 194; see also GC Exh. 5 at 72–74.

two to four minutes that day, but he noted in his incident report that vehicles were detained from between one and two minutes that day.⁴⁹ Specifically, one vehicle, who was detained for about a minute, exited through the driveway entrance when he became impatient because he was prevented from leaving through the driveway exit.⁵⁰ Another vehicle was blocked for about one minute.

Tolentino testified that, on October 30, he was stopped by Respondent's picket line three times while he valeted cars that day. According to Tolentino, Smith made eye contact with him the first time that Tolentino was stopped by Gonzales and Smith timed how long Tolentino was blocked. Both believed that Tolentino was stopped by Gonzales for between two and three minutes on that first occasion. Tolentino also testified that, on the other two occasions he valeted cars, he was stopped between two and four minutes when he tried to exit the Hotel that morning.⁵¹

Tolentino also witnessed other valet drivers being prevented from exiting the Hotel. According to Tolentino, he saw several guests drive their vehicles out of the driveway entrance to avoid the picketers stationed at the exit. Tolentino noted that when one guest was blocked for several minutes from exiting the Hotel he became so frustrated with the wait he accelerated his vehicle toward the picketers as if he was going to hit them.⁵² Again, Gonzales admitted that, when he served as picket captain on the driveway exit, he generally stopped vehicles for at least 1½ minutes.

Overall, I credit Gonzales' testimony that he stopped vehicles for about 1½ minutes as his testimony is corroborated with the documentary evidence. However, I found Smith's and Tolentino's testimony less than credible regarding vehicle wait times on October 30. Specifically, Smith's and Tolentino's testimony that vehicles waited between two to three minutes is belied by Smith's own incident report, which shows vehicles waited more than two minutes before being allowed to exit the Hotel. To that end, I agree with counsel for Respondent that Smith/Tolentino either overestimated or exaggerated the wait times on October 30. Rather, I primarily rely on the documentary evidence which reveals that, during the October 30 protests, vehicles were blocked from egress for between one to two minutes.⁵³ To a lesser extent, I rely on the October 30 recordings of the protests that generally corroborate the one to two minute wait times of the vehicles recorded on the video. Accordingly, I find that, during the October 30 protests, vehicles were blocked from egress for between one to two minutes.

6. The December 7, 2015 picket

It is undisputed that Respondent maintained a single, small picket line on the morning of December 7 in front of the *porte cochere* driveway exit. The picket lasted from 6:25 to 7:24 a.m. Again, approximately 17 individuals participated in the picket. Gonzales was the picket line

⁴⁹ Tr. 90–91, see GC Exh. 5 at 72–73.

⁵⁰ GC Exh. 5 at 73.

⁵¹ Tr. 91–92, 192–194.

⁵² Tr. 162, 209; see also GC Exh. 5 at 73.

⁵³ GC Exh. 5 at 73.

captain that day.⁵⁴ Smith was on duty that day and observed the entire rally. Tolentino also valeted cars that morning. Picketers carried signs that read, “Aston/Renew No Respect, No Union contract with Unite Here! Local 5.” They chanted, through bullhorns and used various noise makers during the protest. The HPD was called to the Hotel for assistance with crowd control, the noise and “for the safety of non-working hotel employees.”⁵⁵

Tolentino testified that he was stopped by Gonzales at least once while valeting vehicles that morning. He believed he was blocked from exiting the Hotel between two to four minutes.⁵⁶ Moreover, at least four guests and one other valet driver were forced to drive their vehicles out of the driveway entrance due to the picketing.⁵⁷ In addition, a taxi was blocked for approximately two minutes before exiting through the driveway exit. Accordingly, I find that, on December 7, vehicles were blocked from egress for between two and four minutes.

Lastly, it is undisputed that, throughout all the days of the protests/pickets, no threats or other negative language or gesture were directed at valets as they drove vehicles into or out of the *porte cochere*. In fact, some of the picket captains gave the valets the “thumbs up” or the “Shaka” sign – a hand gesture/greeting used to say “hello” as they drove through the line. In fact, many of the valets, except Tolentino, smiled at the picket captains and/or responded using the “Shaka” sign as they drove into or out of the *porte cochere*.

III. DISCUSSION AND ANALYSIS

The complaint alleges, and the General Counsel and Charging Party contend, that Respondent’s conduct in blocking the ingress/egress of vehicles entering and exiting the Hotel’s *porte cochere* during its picketing was coercive and violated Section 8(b)(1)(A) of the Act. Respondent denies the allegation, essentially arguing that if some blocking occurred, the conduct did not amount to restraint or coercion; rather, constituted nothing more than a minor inconvenience lasting at most, a few minutes in length. Alternatively, Respondent argues that no violation occurred since the picketing was not directed at employees and ultimately, no employees’ rights were restrained. I disagree with Respondent and find a violation occurred.

A. Legal Principles

To establish a Section 8(b)(1)(A) violation, there must be: (1) restraint or coercion, (2) by a labor organization or its agents, (3) against employees in the exercise of rights guaranteed in Section 7 of the Act.⁵⁸ It is well settled that the union’s conduct in blocking the ingress/egress from an employer’s facility constitutes restrained, coercive conduct violative of Section

⁵⁴ GC Exh. 7; U. Exh. 1.

⁵⁵ GC Exh. 5 at 49.

⁵⁶ Tr. 196–197.

⁵⁷ GC Exh. 5 at 49–50.

⁵⁸ *Longshoremen ILWU (Sunset Line and Twine, Inc.)*, 79 NLRB 1487, 1504 (1948).

8(b)(1)(A).⁵⁹ Although, in certain circumstances, single, isolated, brief or momentary delays to the entry or exit of the employer's facility may not violate the Act,⁶⁰ in general, the Board has found that the blocking of a vehicle's ingress/egress, even for a short period of time, is coercive and violative of the Act.⁶¹ The test for determining restraint or coercion is an objective one which focuses on whether the blocking is such that, under the circumstances, may reasonably tend to coerce or intimidate employees in the exercise of rights of their Section 7 rights.⁶² Although not a bright line rule, the Union's conduct will violate the Act when it's "pattern of conduct evidenc[es] a strategy of refusing to limit [its] picket to peaceful appeals for support."⁶³

B. Analysis

In this case, the evidence clearly demonstrates that the Union blocked the ingress/egress of many vehicles over several days for between one to three minutes.

The record evidence makes clear, and it is uncontested, that at various times during the picketing on August 18, October 3, 14, 24, and 30, and December 7, 2015, the Union intentionally blocked the ingress/egress of valet employees (and other guests, taxis and patrons) from entering or leaving the Hotel when the Union's picket captains positioned themselves between the vehicles and the entrance/exit to the Hotel. Photographs and video recordings show how picket captains Kerwin and Gonzales extended their hand signaling each driver (including valet employees) to stop for periods ranging on average between two and four minutes while the picketers marched in front of the Hotel entrance/exit. I generally credited the documentary evidence and the General Counsel's witnesses (where the testimony was corroborated by the documentary evidence) of having personally observed on numerous occasions various vehicles driven by valet employees being blocked on average for between two to three minutes.

Credited testimony also demonstrates that, at least on one occasion on August 18, the Union held up vehicles so long that traffic backed up onto Paoakalani Avenue. Such a line of traffic would have been seen by valet and other non-striking employees as they began work for the day. As such, I reject Respondent's argument that whatever blocking that may have occurred was brief and merely inconvenienced vehicles, and as such, did not rise to the level of restraint or

⁵⁹ *Tube Craft*, 287 NLRB 491, 493 (1987)(union violated the Act where its picket intentionally blocked the entrance and prevented employee access to an employer's facility for about 2 ½ to 65 minutes multiple times over an 8-day period).

⁶⁰ See *SEIU Local 525*, 329 NLRB 638, 655 (1999), *enfd.* 52 Fed. Appx. 357 (2002) (Board found no violation when, in a single incident, two strikers, for two to three minutes, impeded a single co-worker from entering the employer's premises while one of the strikers placed his hand on the co-worker's shoulder. The Board considered the incident "momentary and noncoercive, amounting to an inconsequential act of misconduct.").

⁶¹ *Int'l Union of Operating Engineers Local No. 17 (Hertz Equipment Rental Corp)*, 335 NLRB 578, 584 (2001); *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB 426, 431 (1995).

⁶² *Carpenters (Society Hill Towers)*, 335 NLRB 814, 815 (2001), *enfd.* 50 Fed. Appx. 88 (3d Cir. 2002); see also *Plumbers Local 38 (Bechtel Corp.)*, 306 NLRB 511, 518 (1992).

⁶³ *Carpenters*, *supra*.

coercion under the Act.⁶⁴ On the contrary, I note that, for the August 18 protest, Respondent presented no evidence, and for the October 3 protest, Respondent presented little evidence to contradict Smith's account of the two to three minute wait times for vehicles to enter/exit the Hotel during the Union's picket. As found above, the blocking of vehicles, even for a brief period, as was the case here, is coercive and violates the Act.⁶⁵ Moreover, unlike the case in *SEIU Local 525*, 329 NLRB 638 (1999), where the Board found the blocking of a single co-worker from entering the worksite by the Union on one occasion inconsequential, the blocking that occurred in this case occurred repeatedly for several minutes at a time on eight separate occasions. Viewing the totality of the circumstances, I find that the Union's picketing activities would reasonably tend to coerce or intimidate employees in the exercise of rights of their Section 7 rights.

Respondent also argued that no employee's rights were restrained since its pickets were not directed at non-striking employees. I disagree. Indeed, the valet employees were directly affected by and prevented from entering/exiting the Hotel due to Respondent's pickets. Moreover, the fact that some valet employees responded positively to the picket by using the "Shaka" sign does not negate the fact that those employees were blocked from entering/exiting the Hotel. Furthermore, it is undisputed that the Union protests were loud, with chanting, shouting slogans using bullhorns, and carrying picket signs. Most significantly, the record reveals that the police were called to intervene on each day of the protests for crowd control, the noise and for the safety of other nonstriking employees. As such, it is certainly reasonable to conclude that non-striking employees would have seen/heard the commotion of the Union's protests and redirected themselves away from the front of the Hotel. Such activity constitutes a restraint on those employees' right to be free to refrain from participating in the Union's protests.⁶⁶

Accordingly, I find that Respondent's conduct in blocking multiple vehicles seeking to enter/exit the Hotel's *porte cochere* was coercive and violated Section 8(b)(1)(A) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Charging Party, Aqua-Aston Hospitality, LLC, which operates the Aston Waikiki Beach Hotel and Hotel Renew, is an employer engaged in commerce with the meaning of Sections 2(2), (6), and (7) of the Act.

⁶⁴ See e.g., *Evergreen Nursing Home & Rehab Center*, 198 NLRB 10, 12 (1972) (finding that the union had not violated Sec. 8(b)(1)(A) when, among other things, it placed two chairs on either side of a driveway that still allowed vehicles to pass between them).

⁶⁵ *Sheet Metal Workers Local 19 (Delcard Assoc)*, *supra* at 431.

⁶⁶ Respondent raised several affirmative defenses to this complaint; namely, that the allegations herein fail to state a claim, are time barred pursuant to Sec. 10(b) of the Act, and that its conduct was protected under Sec. 8(c) of the Act and by the First Amendment. However, since I found that Respondent's conduct in blocking the ingress/egress of vehicles, including those driven by valet employees, violate Sec. 8(b)(1)(A) of the Act, I reject all of Respondent's defenses for the reasons and authorities cited by the General Counsel and Charging Party.

2. Respondent, UNITE HERE! Local 5, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) of the Act by blocking the ingress and/or egress to the Aston Waikiki Beach Hotel on August 18, October 3, 14, 24, and 30, and December 7, 2015.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent UNITE HERE! Local 5 has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁶⁷

ORDER

The Respondent, UNITE HERE! Local 5, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Blocking vehicles seeking to enter/exit the Aston Waikiki Hotel in Honolulu, Hawaii.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its offices in Honolulu, Hawaii, copies of the attached notice marked "Appendix"⁶⁸ **in both English, Ilocano and Tagalog**. Copies of the notice, on forms provided by the Regional Director for Subregion 37, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places

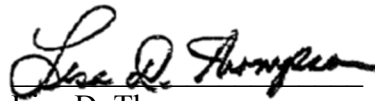
⁶⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶⁸ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees and members⁶⁹ are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and members by such means.
 5 Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, deliver to the Regional Director for Subregion 37 a sworn certification of a responsible official on a form provided by the Region
 10 attesting to the steps that Respondent has taken to comply.

Dated: Washington, D.C., January 18, 2017.

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 Lisa D. Thompson
 Administrative Law Judge

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 45 ⁶⁹ The notice should be addressed to "EMPLOYEES AND MEMBERS" where a union violates the Act in a manner that affects both members and nonmembers. *Postal Workers Local 735 (Postal Service)*, 342 NLRB 545 (2004).

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT block your ingress or egress to the entrance or exit of the Aston Waikiki Hotel's porte cochere.

WE WILL NOT in any other manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days after service by the NLRB's Subregion 37, post at our offices in Honolulu, Hawaii, copies of this notice marked "Appendix" **in both English, Ilocano and Tagalog** advising you of your Section 7 rights.

UNITE HERE! LOCAL 5

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

National Labor Relations Board
Subregion 37
300 Ala Moana Blvd., Rm. 7-245
P.O. Box 50208
Honolulu, HI 96850-7245
(808) 541-2814, Hours of Operation: 8:00 a.m. to 4:30 p.m. (HAT)

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CB-163657 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (808) 541-2814.